Supreme Court, U.S.
FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

[K-110]

80-813
No.

In The

Supreme Court of the United States

TERM

NEW YORK STATE LIQUOR AUTHORITY,

Petitioner,

against

DENNIS BELLANCA, d/b/a THE MAIN EVENT; JAMES C. DeMARCO, d/b/a COLONIE RESTAURANT; BIAGIO DiBLASI & GENNIE PALOMBO, d/b/a FRANK'S CASA NOVA; VINCENT IUDICE, d/b/a 19th HOLE RESTAURANT; PETER KACHINOSKI, d/b/a KACH'S CORNER; JACOB P. PAGANO, d/b/a THE SILVER COACH; RON PAOLINI, d/b/a FRIDAYS AND SATURDAYS LOUNGE; STANLEY J. PROCYSHYN & SYLVIA PROCYSHYN, d/b/a SHVEEDEE'S LOUNGE; NEAL RADICE, d/b/a RADICE'S LOUNGE: SAMUEL RESMAN, d/b/a GLO MAR BAR; TALE OF THE TIGER, INC., d/b/a FLAY'S STEAK PUB; LEONARD ZAMBITO, d/b/a LENNY'S BLUE VELVET LOUNGE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioner
The Capitol
Albany, New York 12224
Telephone (518) 474-2432

SHIRLEY ADELSON SIEGEL
Solicitor General

PETER J. DOOLEY
Assistant Attorney General
of Counsel

The Daily Record
Rochester, New York

(6400)

Spaulding Law Printing
Syracuse, New York

In The

Supreme Court of the United States

TERM

No.

NEW YORK STATE LIQUOR AUTHORITY,

Petitioner,

against

DENNIS BELLANCA, d/b/a THE MAIN EVENT; JAMES C. DeMARCO, d/b/a COLONIE RESTAURANT; BIAGIO DiBLASI & GENNIE PALOMBO, d/b/a FRANK'S CASA NOVA; VINCENT IUDICE, d/b/a 19th HOLE RESTAURANT; PETER KACHINOSKI, d/b/a KACH'S CORNER; JACOB P. PAGANO, d/b/a THE SILVER COACH; RON PAOLINI, d/b/a FRIDAYS AND SATURDAYS LOUNGE; STANLEY J. PROCYSHYN & SYLVIA PROCYSHYN, d/b/a SHVEEDEE'S LOUNGE; NEAL RADICE, d/b/a RADICE'S LOUNGE: SAMUEL RESMAN, d/b/a GLO MAR BAR; TALE OF THE TIGER, INC., d/b/a FLAY'S STEAK PUB; LEONARD ZAMBITO, d/b/a LENNY'S BLUE VELVET LOUNGE,

Respondents.

Question Presented

May a state under the broad powers conferred upon it by the Twenty-first Amendment to regulate the sale of alcoholic beverages, ban topless dancing in licensed premises as part of its liquor license program?

Parties

All parties to the action are named in the caption. There were two additional nominal defendants in the courts below, the Erie County Alcoholic Beverage Control Board, and former Attorney General Louis J. Lefkowitz. They have been dropped from the caption of this petition, as the State Liquor Authority will represent all of the interests of the State of New York.

TABLE OF CONTENTS

	Page
Question Presented	2
Parties	2
Table of Cases	4
Opinions Below	5
Jurisdiction	5
Date of Entry	5
Constitutional Provisions and Statutes Involved	5
Statement of the Case	6
ARGUMENT	
The topless dancing ban here involved is within the State's broad power under the Twenty-first Amendment to regulate the dispensation of alcoholic beverages and is not an unconstitutional infringement of First Amendment rights of free speech	7
CONCLUSION — A Writ of Certiorari should be issued to the New York State Court of Appeals to review its determination that a statute banning topless female entertainment in licensed premises violates the First Amendment of the Federal Constitution	10
APPENDICES	
APPENDIX A — Order of New York State Court of Appeals	A-1
APPENDIX B — Opinion of New York State Court of Appeals	A-2
APPENDIX C — Judgment of New York Supreme Court appealed from	A-16
APPENDIX D — Memorandum Decision of New York Supreme Court	A-18

TABLE OF CASES

	Page
California v LaRue, 409 US 109	5, 7, 8
Doran v Salem Inn, Inc., 422 US 922	5, 6, 8, 9
Ziffrin, Inc. v Reeves, 308 US 132	7

Opinions Below

The opinion of the New York State Court of Appeals is reported in 50 NY2d 524 (Advance Sheet No. 132), and a copy is attached hereto at Appendix A-2. The opinion of the New York State Supreme Court, Erie County, has been neither officially nor unofficially reported, but appears in the Record at pp 10-20, and a copy is attached hereto at Appendix A-18.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 USC 1257(3) and U.S. Supreme Court Rule 17.1(c), because a State statute has been declared unconstitutional under the Federal Constitution in seeming contradiction to this Court's holding in *Doran v Salem Inn, Inc.*, 422 US 922 and *California v LaRue*, 409 US 109, thus presenting a federal question of substance in a way probably not in accord with applicable decisions of this Court.

Date of Entry

The order sought to be reviewed was entered June 10, 1980. Notice of entry has not yet been served on petitioner. Motion for rehearing and for amendment of remittitur heard and denied on October 16, 1980. This petition, filed pursuant to 28 USC 1257(3) is therefore timely.

Constitutional Provisions and Statutes Involved

Constitution of the United States, Amendment 1

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Constitution of the United States, Amendment 21

> "Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> "Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
>
> "Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

New York State Alcoholic Beverage Control Law, § 106(6-a)

(New York Session Laws, 1977, ch 321; McKinney's Consolidated Laws of New York, Vol 3, pocket supplement 1980, pp 53-54).

> "No retail licensee for on premises consumption shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof."
>
> (n.b. The statute contains no penalties for violation thereof.)

Statement of the Case

Respondents are operators of licensed premises featuring so-called "topless entertainment." In 1977, following this Court's decision in *Doran v Salem Inn, Inc.*, 422 US 922, the New York State Legislature amended the Alcoholic Beverage Control Law to ban topless waitresses and topless female dancers in bars and nightclubs. (The statute would not apply to legitimate theaters where stage and seating areas are not part of the licensed

premises.) Respondents instituted an action for a declaratory judgment in the State court against the State Liquor Authority, the Erie County Alcoholic Beverage Control Board and then State Attorney General Louis J. Lefkowitz, seeking to have the amendment declared unconstitutional, alleging that they would lose "business if dancers' breasts were required to be covered", and that "topless dancing is a form of expression protected by the First Amendment." The Erie County Alcoholic Beverage Control Board and former Attorney General Louis J. Lefkowitz have been dropped as parties to this appeal.

The State Liquor Authority filed a motion to dismiss the Complaint, which was denied, and the Court then granted summary judgment to respondents on the Complaint. The State Liquor Authority took a direct appeal to the State Court of Appeals which resulted in the 4 to 3 opinion sought to be reviewed here.

ARGUMENT

The topless dancing ban here involved is within the State's broad power under the Twenty-first Amendment to regulate the dispensation of alcoholic beverages and is not an unconstitutional infringement of First Amendment rights of free speech.

A state has absolute power under the Twenty-first Amendment to totally prohibit the sale of intoxicants and certainly broad if not absolute power to permit sale only under definitely prescribed conditions. "The greater power includes the less" (*Ziffrin, Inc. v Reeves*, 308 US 132, 138 [1939]; *cf. California v LaRue*, 409 US 109 [1972]). Such power should not lightly be circumscribed, and there is, moreover, a presumption in favor of the validity of state regulation in this area required by the Twenty-first Amendment (*California v LaRue, supra*). This presumption was not overcome by respondents on this record, as the dissent in the Court of Appeals strongly points out. In ad-

dition, as in *California v LaRue, supra*, at p 119, footnote 5, the challenge here involves a facial attack, rather than a particular application, and there has been no showing by respondents that the statute is irrational or unreasonable as this Court has required in *LaRue*.

The purpose of this statute was set forth in an accompanying legislative memorandum (NY State Legislative Annual — 1977, p 150):

> "Nudity is the kind of conduct that is a proper subject for legislative action as well as regulation by the State Liquor Authority as a phase of liquor licensing. It has long been held that sexual acts and performances may constitute disorderly behavior within the meaning of the Alcoholic Beverage Control Law. What soberness and dress conceal, drunkenness and nudity reveal. Freedom, undisciplined by a sense of responsibility in its use, can produce chaos.
>
> "Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand."

The Legislature in effect adopted as a finding the sponsor's statement that nudity on licensed premises begets undesirable behavior and conduct that is out of hand, and determined to ban it for protection of the public good. Did not the Court of Appeals err then, in substituting its judgment that such a finding lacked reasonable basis, particularly in view of the experience of other jurisdictions (cf. *California v LaRue, supra*).

The First Amendment protection to be accorded to topless dancing as a form of expression or communication was said by this Court in *Doran v Salem Inn, Inc.*, 422 US 922 (1974) (at p 932) to involve the "barest minimum" of protection. Where the barest minimum protection confronts the broad power of the State to control the sale of alcoholic beverages under the Twenty-

first Amendment, it must give way. In *Doran v Salem Inn, Inc., supra,* at pp 932-933, this Court said that *LaRue* holds that a state can ban topless dancing as part of its liquor license program:

> "Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v LaRue,* 409 US 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In *LaRue,* however, we concluded that the broad powers of the States to regulate the sale of liquor conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program."

What this Court said the State could do in *Doran, supra,* is precisely what the New York State Legislature did in the instant case. The majority decision of the New York State Court of Appeals is therefore in error, contrary to this Court's statement in *Doran,* and should be reversed. At the least, a clarification of the State's power in this area is warranted and certiorari should be granted.

Petitioner would further observe that the same, or very similar issues sought to be reviewed here appear to be raised in several other cases before the Court, as summarized in U.S. Law Week, although involving statutes of other states.

No. 80-405, *Tran Con Corp. v Alcoholic Beverage Control Board,* is a petition for certiorari to the California Court of Appeals; No. 80-336, *Brubeck v Florida* purports to be a direct appeal from a decision without opinion of a Florida Circuit Court reported in 384 S2d 1378.

It is our information that these matters were subject of a conference on October 31, 1980, and the New York State Liquor

Authority would request that, if the issues are similar as they appear to be, this matter be considered along with those previously cited.

CONCLUSION

A Writ of Certiorari should be issued to the New York State Court of Appeals to review its determination that a statute banning topless female entertainment in licensed premises violates the First Amendment of the Federal Constitution.

Dated: Albany, New York
October 28, 1980

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioner

SHIRLEY ADELSON SIEGEL
Solicitor General

PETER J. DOOLEY
Assistant Attorney General
of Counsel

Appendices

APPENDIX A
ORDER OF NEW YORK STATE COURT OF APPEALS

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of October A.D. 1980

PRESENT, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

Mo. No. 1047

Dennis Bellanca, d.b.a. The Main Event, et al.,

Respondents,

vs.

New York State Liquor Authority, et al.,

Appellants.

A motion for reargument or to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied in each respect.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

(SEAL)

APPENDIX B
OPINION OF NEW YORK STATE COURT OF APPEALS

Dennis Bellanca, Doing Business as The Main Event, et al., Respondents, v New York State Liquor Authority et al., Appellants.

Argued April 30, 1980; decided June 10, 1980

SUMMARY

Appeal, on constitutional grounds, from a judgment of the Supreme Court at Special Term (John H. Doerr, J.), entered June 21, 1979 in Erie County, granting summary judgment to plaintiffs and declaring subdivision 6-a of section 106 of the Alcoholic Beverage Control Law unconstitutional as applied to topless dancing in premises licensed to sell liquor for consumption on the premises and, to that extent, enjoined its enforcement.

Plaintiffs are the owners of nightclubs, bars and restaurants which, for several years, have featured topless dancing. The plaintiffs also sell alcoholic beverages to their patrons for consumption on the premises, pursuant to licenses issued by the State Liquor Authority. The plaintiffs commenced this declaratory judgment action claiming that subdivision 6-a of section 106 of the Alcoholic Beverage Control Law, recently amended to prohibit topless dancing in addition to other activities on licensed premises, in unconstitutional to the extent that it prohibits all topless dancing at premises licensed by the State Liquor Authority. No criminal penalty is provided for violating the statute, but a violation of this law may result in a loss of the liquor license. The trial court found that topless dancing is a type of expression protected by the First Amendment to the United States Constitution and that the State had failed to show some serious and compelling reason to limit it, stating that bland reliance on the Twenty-first Amendment is insufficient. Accordingly, the court declared subdivision 6-a

unconstitutional as applied to topless dancing in licensed premises and, to that extent, enjoined its enforcement. The State appealed.

The Court of Appeals affirmed, holding, in an opinion by Judge Wachtler, that topless dancing is entitled to at least a minimum of protection under the First Amendment and that the State cannot arbitrarily prohibit it in all places licensed to sell alcoholic beverages.

HEADNOTE

Intoxicating Liquors — Licenses — Topless Dancing

Topless dancing is not inherently obscene and is a form of expression entitled to at least a minimum of protection under the First Amendment to the United States Constitution, although, since it involves conduct, it is subject to more restrictions than the more static arts; the State cannot prohibit topless dancing under all circumstances and neither may the State, under subdivision 6-a of section 106 of the Alcoholic Beverage Control Law, arbitrarily prohibit it at all places licensed to sell alcoholic beverages. Accordingly, since the State has failed to demonstrate that there is rational connection between the activity sought to be prohibited and the State's legitimate concern in controlling liquor consumption, the trial court properly declared subdivision 6-a unconstitutional as applied to topless dancing in licensed premises and, to that extent, enjoined its enforcement.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES*

3 NY Jur 2d, Alcoholic Beverages §103
CLS, Alcholic Beverage Control Act §106 subd 6-a

APPENDIX B
Opinion of New York State Court of Appeals

45 Am Jur 2d, Intoxicating Liquors §285
10 Am Jur Trials 1, Obscenity Litigation

ANNOTATION REFERENCES

Construction and application of statute or ordinance respecting amusements on premises licensed for sale of intoxicating liquor. 4 ALR2d 1216.

Topless or bottomless dancing or similar conduct as offense. 49 ALR3d 1084.

*By the Publisher's Editorial Staff.

POINTS OF COUNSEL

Robert Abrams, Attorney-General (Peter J. Dooley and *Shirley Adelson Siegel* of counsel), for appellants. The topless dancing ban here involved is within the State's broad power under the Twenty-first Amendment to regulate the dispensation of alcoholic beverages and is not an unconstitutional infringement of First Amendment rights of free speech. *(California v La Rue,* 409 US 109; *Matter of Zorach v Clauson,* 303 NY 161; *Salem Inn v Frank,* 501 F2d 18, affd *sub nom. Doran v Salem Inn,* 442 US 922; *Salem Inn v Frank,* 522 F2d 1045; *Inturri v Healy,* 426 F Supp 543; *Matter of Beal Props. v State Liq. Auth.,* 37 NY2d 861; *Defiance Milk Prods. Co. v Du Mond,* 309 NY 537; *I.F.I.L.Y. Co. v Temporary State Housing Rent Comm.,* 10 NY2d 263; *People v Broadie,* 37 NY2d 100).

Georye P. Doyle for respondents. The Supreme Court, Erie County (Doerr, J.), was correct in declaring subdivision 6-a of section 106 of the Alcoholic Beverage Control Law unconstitutional under the First and Fourteenth Amendments to the United States Constitution and section 8 of article I of the

APPENDIX B
Opinion of New York State Court of Appeals

New York State Constitution. *(Salem Inn v Frank*, 522 F2d 1045; *California v La Rue*, 409 US 109; *Salem Inn v Frank*, 501 F2d 18, affd *sub nom. Doran v Salem Inn*, 422 US 922; *Lucifer's Gate v Town of Van Buren*, 83 Misc 2d 790; *Erznoznik v City of Jacksonville*, 422 US 205; *Southeastern Promotions v Conrad*, 420 US 546; *Matter of TJPC Rest. Corp. v State Liq. Auth.*, 61 AD2d 441; *Chapin v Town of Southampton*, 457 F Supp 1170; *Schneider v State*, 308 US 147).

OPINION OF THE COURT

Wachtler, J.

The question on this appeal is whether a provision of the Alcoholic Beverage Control Law (§106, subd 6-a) is unconstitutional insofar as it prohibits topless dancing at premises licensed by the State Liquor Authority. The Supreme Court, Erie County, held this portion of the statute unconstitutional. The State has appealed directly to this court pursuant to CPLR 5601 (subd [b], par 2).

The plaintiffs are the owners of nightclubs, bars and restaurants which, for several years, have featured topless dancing. The plaintiffs also sell alcoholic beverages to their patrons for consumption on the premises, pursuant to licenses issued by the State Liquor Authority. That agency has adopted rules prohibiting nudity and "lewd or indecent conduct" on premises licensed to sell alcohol.[1] The rules also specifically prohibit the licensee from permitting "any female" to appear

[1]The rules provide that a license or permit may be revoked, canceled or suspended "For suffering or permitting on licensed premises (1) any lewd or indecent conduct or (2) any person to appear unclothed or in such manner or attire as to expose to view any portion of the pubic hair, anus, vulva or genitals, or any simulation thereof" (9 NYCRR 53.1[r]).

with breasts "expose[d] to view" but, as originally adopted, contained an exception for topless dancing which, although not prohibited, was subject to strict regulation.[2]

In 1977 the Legislature added nearly identical provisions to the Alcoholic Beverage Control Law (L 1977, ch 321, §1). However, this statute (Alcoholic Beverage Control Law, §106, subd 6-a) did not carry forward the exception permitting topless dancing.[3] No criminal penalty is provided for violating this statute (see Alcoholic Beverage Control Law, §130, subds 3, 5). But a violation of this law may result in a loss of the liquor license (9 NYCRR 53.1[s]).

The plaintiffs commenced this declaratory judgment action claiming that subdivision 6-a is unconstitutional to the extent it prohibits all topless dancing at premises licensed by the State Liquor Authority. The plaintiffs stated that they had always complied with the Liquor Authority's rules and restrictions with respect to topless dancing. In addition it was alleged that this activity is not observable from the public streets and the fact that it is featured is clearly noted on signs posted outside the

---

[2]This rule (former subd [s] of 9 NYCRR 53.1) provided that the licensee should not suffer or permit "any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof. The provisions of this subdivision shall not apply to any female entertainer performing on a stage or platform which is at least 18 inches above the immediate floor level and which is removed by at least six feet from the nearest patron."

[3]The statute reads as follows: "No retail licensee for on-premises consumption shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola" (Alcoholic Beverage Control Law, §106, subd 6-2).

plaintiffs' premises. "Consequently", the complaint states, "no person has been exposed to topless dancing performances at Plaintiffs' premises except by choice." In their first cause of action they argued that the topless dancing featured at their establishments "is not lewd or obscene within the meaning of the United States Constitution, and is a form of protected expression under the First Amendment." In the remaining three causes of action the plaintiffs claimed that subdivision 6-a is also overbroad, violates the equal protection clause and infringes on their freedom of expression guaranteed by section 8 of article I of the State Constitution. They therefore asked the court to declare subdivision 6-a unconstitutional to the extent that it prohibits topless dancing in licensed premises and also sought an injunction barring the State from enforcing this law in the future.

In response the State contended that "notwithstanding the Constitutional provisions which guarantee freedom of expression" it may, pursuant to the Twenty-first Amendment of the United States Constitution, "regulate the type of entertainment in establishments licensed in this State to sell alcoholic beverages."[4]

The trial court recognized the State's broad power to control and regulate the sale of liquor in order to protect the public from its effects *(California v La Rue,* 409 US 109). It found, however, that topless dancing is "a type of expression protected by the First Amendment" and that the State had failed to "show some serious and compelling reason to limit it. Bland reliance on the Twenty-first Amendment is insufficient". Thus the court

---

[4]The Twenty-first Amendment, which repealed national prohibition, also provides in the second section: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

declared subdivision 6-a unconstitutional as applied to topless dancing in licensed premises, and to that extent, enjoined its enforcement.[5]

On this appeal the State contends that this judgment is inconsistent with the United States Supreme Court's holding in *California v La Rue (supra).*

In *La Rue* the court held facially valid certain administrative rules regulating the type of entertainment that might be presented in bars and nightclubs licensed by the State. The rules prohibited what the court described as acts of "gross sexuality" including display of the genitals and live or filmed performances of sexual acts. They noted that before the rules were promulgated, hearings were held and it was shown that at premises where these acts were performed, "numerous incidents of legitimate concern to the Department had occurred" *(California v La Rue, supra,* at p 111). These incidents included "bacchanalian revelries" involving public sexual acts between customers and entertainers, as well as assaults, rape and indecent exposure committed at or near such premises.

In upholding the regulations the court observed that the Twenty-first Amendment, granting the States power over the sale and distribution of liquor within their borders, has been recognized as conferring on the States something more than the normal authority inherent in the police power. Although that amendment did not nullify the other provisions of the Constitution whenever the State seeks to regulate the sale of liquor,

---

[5]The court expressly relied on the First Amendment. Although it also concluded, summarily, that subdivision 6-a violated section 8 of article I of the State Constitution, we find it unnecessary to consider that question or the additional points raised in the complaint, since in our view, the First Amendment argument presented in the first cause of action is dispositive.

it did serve to "strengthen" the State's authority in that particular area. The court conceded that some of the performances prohibited by the regulations would be entitled to constitutional protection but noted that the regulations claimed to be invalid on their face, in "substance" prohibited performances "that partake more of gross sexuality than of communication" *(California v La Rue, supra,* at p 118). The State's conclusion that these acts should not be permitted at places authorized to sell liquor was held not to be "an irrational one" in light of "the evidence from the hearings" *(California v La Rue, supra,* at pp 115, 116). "Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution" *(California v La Rue, supra,* at pp 118-119).

In the case now before us the plaintiffs do not claim a right to offer performances of explicit sexual acts, live or filmed, real or simulated. Nor are we concerned with nude dancing. There is no contention that the plaintiffs should have a right to present their dancers entirely unclothed, and thus they do not challenge that portion of the statute which prohibits nudity. Nor do they contest the statute insofar as it would prohibit women other than dancers from appearing bare-breasted on their premises. Similarly the plaintiffs do not contest the State's right to place some restrictions on topless dancing performances as the Liquor Authority's regulations have done in the past. Finally, of course, the plaintiffs do not claim that they are exempted from the obscenity laws or that topless dancing should always be allowed no matter how, or where performed. The only question before us is whether the statute is constitutional to the extent that it absolutely prohibits liquor licensees from presenting nonobscene topless dancing performances to willing customers under all circumstances.

APPENDIX B
Opinion of New York State Court of Appeals

Thus unlike the court in *La Rue*, we are not confronted with a broad attack on the facial validity of a statute which in "substance" prohibits acts of "gross sexuality", most of which are probably criminally obscene as well. Here the challenge narrowly focuses on a rule prohibiting a single activity, topless dancing, which is not inherently obscene. On the contrary it has been legally recognized as a form of expression *(Doran v Salem Inn*, 422 US 922) like nudity in art and sculpture. Of course involving conduct, as it does, it is undoubtedly subject to more restrictions than the more static arts. But although offensive to some, as all nudity or partial nudity is, it is nevertheless entitled to at least minimal protection under the First Amendment. Certainly the State could not prohibit topless dancing under all circumstances *(Doran v Salem Inn, supra)*. Neither, in our view, may the State arbitrarily prohibit it at all places licensed to sell alcohol.[6]

Here there is nothing in the record to show that the State's conclusion, that this activity should not take place at licensed premises, was rationally based on evidence demonstrating a

---

[6]We recognize, as the dissent does, that in *Doran* the Supreme Court observed, in dictum (at pp 932-933), that they had concluded in *La Rue* that "the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program". We also note, however, that more recently the Supreme Court has taken a narrower view of its holding in *LaRue*, indicating, again by way of dictum, that in that case they had simply "relied upon the Twenty-first Amendment to 'strengthen' the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communication' " (*Craig v Boren*, 429 US 190, 207). We, of course, do not consider this dictum any more controlling than the contrary dictum of *Doran*. What we do consider dispositive are the factors which the Supreme Court discussed so extensively and actually relied upon in *La Rue* as noted above.

need for the rule. Indeed it appears that the law was not prompted by hearings or any legislative awareness of deficiencies in the prior regulation permitting topless dancing subject to restrictions and the continued supervision of the State Liquor Authority.

The State urges however that we indulge an additional presumption and assume that the Legislature did investigate and find sufficient facts to support the legislation (see, e.g., *I.L.F.Y. Co. v Temporary State Housing Rent Comm.*, 10 NY2d 263, 269; *Defiance Milk Prods. Co. v Du Mond*, 309 NY 537). But even if the presumption could be held to be equivalent to the actual findings made in *La Rue* — a question we need not decide — it would be inappropriate in this case to presume that topless dancing posed a problem in premises licensed by the State Liquor Authority. It is, in fact, hard to imagine that the agency, which is so vigilant in enforcing the liquor laws and its own regulations would have continued to permit topless dancing at premises authorized to sell liquor if the audiences degenerated into "bacchanalian revelries" or became involved in "incidents of legitimate concern" to the State. Notably, even in California where such incidents occurred in bars permitting gross sexuality, the State found no need to prohibit topless dancing. It simply imposed restrictions similar to those previously found acceptable by the State Liquor Authority in this State (see *La Rue v California*, 326 F Supp 348, 359).

The State's power to control and regulate the sale of alcoholic beverages is designed to protect the public from abuses related to alcohol consumption. It is not a license to censor whatever occurs at premises authorized to sell alcohol. Thus when the State employs this power in such a way as to infringe on activities entitled to some constitutional protection, it must at least demonstrate that there is a rational connection between the

activity sought to be prohibited and the State's legitimate concern in controlling liquor consumption.[7] On the record before us there is nothing which would rationally support a conclusion that in this State it is dangerous to mix alcohol and topless dancing.

Accordingly the judgment of the Supreme Court, Erie County, should be affirmed.

Gabrielli J. (dissenting). I am impelled to dissent, for the holding of the majority is based upon what I perceive to be a misstatement of the law as enunciated by the United States Supreme Court in *Doran v Salem Inn* (422 US 922) and *California v La Rue* (409 US 109).

At issue on this appeal is the power of a State to prohibit topless dancing in an establishment which sells liquor for on-premises consumption. The majority finds this prohibition to be unconstitutional, apparently premising this conclusion upon the belief that the State bears the burden of justifying the rationality of its ban upon topless dancing in drinking establishments, because topless dancing is entitled to some First Amendment protections. The most recent pronouncements of the Supreme Court upon this subject, however, are expressly to the contrary (see *California v La Rue, supra*, at pp 118-119; *Doran v Salem Inn, supra*, at pp 932-933).

When a State acts to regulate the sale of liquor within its boundaries, its authority stems not merely from the normal police power of the State, but also directly from the Twenty-first Amendment to the United States Constitution. This grant of

---

[7]Of course when the State seeks to prohibit more traditional forms of expression, it must make a more compelling showing of need for the restriction. For instance, it would be most difficult to sustain a law prohibiting political discussions in places where alcohol is sold by the drink, even though the record may show, conclusively, that political discussions in bars often lead to disorderly behavior, assaults and even homicide.

power by the Constitution serves to increase that authority which a State normally enjoys and to place a significantly greater burden upon a party seeking to challenge a State regulation of liquor as violative of some other provision of the United States Constitution. This is not to suggest that a State acting under the authority of the Twenty-first Amendment is free to ignore all other parts of the Federal Constitution (see, e.g., *Wisconsin v Constantineau*, 400 US 433; *Craig v Boren*, 429 US 190). Rather, the effect of the Twenty-first Amendment is to require those who would challenge a State regulation of liquor on the ground that it is violative of some other constitutional provision or of supreme Federal law, to prove that the particular interplay of provisions and purposes in each case mandates a disregard of the State's otherwise legitimate powers (compare *Hostetter v Idlewild Liq. Corp.*, 377 US 324, *Seagram & Sons v Hostetter*, 384 US 35, and *State Bd. v Young's Market Co.*, 299 US 59, with *California Retail Liq. Dealers Assn. v Midcal Aluminum*, ____US____, 48 USLW 4238).

In the instance case, plaintiffs claim that the ban on topless dancing in establishments which sell liquor for on-premises consumption is violative of the First Amendment. It is, of course, far too late in the day to suggest that dancing, even topless or nude dancing, is entitled to absolutely no First Amendment protections. Indeed, in both *California v La Rue* (409 US 109, 118, *supra*) and *Doran v Salem Inn* (422 US 922, 932, *supra*) the Supreme Court specifically recognized that such "entertainment" is not bereft of all protection because it does have some communicative aspects. At the same time, however, the court noted, with care, that such "art" forms "involve only the barest minimum of protected expression" (*Doran v Salem Inn, supra*, at p 932; accord *California v La Rue, supra*, at pp 117-118).

Because topless barroom dancing has so little communicative content and is accordingly entitled to only a minimum of First

Amendment protection, whereas the State has the responsibility and, under the Twenty-first Amendment, the power to regulate the sale and use of liquor, the Supreme Court has declared not only that a statute prohibiting or limiting such dancing must be upheld unless it is clearly irrational, but also that the burden is on the challenger of such a law to overcome a presumption of constitutionality and prove that that law is irrational *(California v La Rue, supra,* at pp 118-119). Indeed, in *Doran v Salem Inn,* the court expressly stated that "[i]n *La Rue,* however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program" (422 US, *supra,* at pp 932-933). Moreover, and of great significance, in that same opinion the court intimated that the ban on topless dancing there involved would clearly have been constitutional had it been enacted pursuant to the State's powers under the Twenty-first Amendment and accordingly limited to establishments selling liquor *(Doran v Salem Inn, supra,* at p 933).

Applying these principles to the instant case, it is painfully obvious that the challenged statute is indeed valid and constitutional. Clearly, plaintiffs have not met their burden of proving this particular exercise of the State's power to regulate the sale of liquors to be irrational. Indeed, even the majority of this court appears to have impliedly conceded that plaintiffs have failed to meet this burden since, in order to declare the statute unconstitutional, the majority is forced to place the burden of proving the statute's reasonableness upon the State, in direct contradiction to the doctrine enunciated in *La Rue.* Moreover, this statute does contain the very limitations which the Supreme Court indicated would have sufficed to place the ordinance at issue in *Doran* beyond challenge. Hence I find it impossible to concur in the result reached by a majority of this court today.

APPENDIX B
Opinion of New York State Court of Appeals

In conclusion, I must emphasize that Judges called upon to determine the constitutionality of a challenged statute are required to set aside their personal opinions of what is best and strive "to resolve the issue by constitutional measurement, free of emotion and of predilection" *(Roe v Wade*, 410 US 113, 116). This is so for the very basic reason that "the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution" *(Lochner v New York*, 198 US 45, 76 [Holmes, J., dissenting]). In his official capacity, a Judge may serve neither as a moralist nor as a libertine, but simply must endeavor to decide each case on the basis of the applicable law. Whatever artistic or communicative value may attach to topless dancing is here overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. No reasonable person, moralist or not, could deny that the admixture of alcohol and topless dancing presents a very real possibility of disturbances of the public peace in licensed premises, a problem which may be addressed in advance by the Legislature. The elected representatives of the people of this State have now chosen to avoid such disturbances by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption. Although some may believe this solution to be unwise or unnecessary, there exists no justification for disturbing the legislative judgment in this case.

Accordingly, I dissent and vote to reverse the judgment appealed from and to declare the statute to be constitutional.

Judges Jones, Fuchsberg and Meyer concur with Judge Wachtler; Judge Gabrielli dissents and votes to reverse in a separate opinion in which Chief Judge Cooke and Judge Jasen concur.

Judgment affirmed, with costs.

APPENDIX C
JUDGMENT OF NEW YORK SUPREME COURT APPEALED FROM

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Erie at the Erie County Courthouse, Buffalo, New York, on the 20th day of March, 1978.

PRESENT: JOHN H. DOERR, J.S.C. Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

DENNIS BELLANCA, d/b/a THE MAIN EVENT; JAMES C. DeMARCO, d/b/a COLONIE RESTAURANT; BIAGIO DiBLASI & GENNIE PALOMBO, d/b/a FRANK'S CASA NOVA; VINCENT IUDICE, d/b/a 19th HOLE RESTAURANT; PETER KACHNOSKI, d/b/a KACH'S CORNER; JACOB P. PAGANO, d/b/a THE SILVER COACH; RON PAOLINI, d/b/a FRIDAYS AND SATURDAYS LOUNGE; STANLEY J. PROCYSHYN & SYLVIA PROCYSHYN, d/b/a SHVEEDEE'S LOUNGE; NEAL RADICE, d/b/a RADICE'S LOUNGE; SAMUEL RESMAN, d/b/a GLO MAR BAR; TALE OF THE TIGER, INC., d/b/a FLAY'S STEAK PUB; LEONARD ZAMBITO, d/b/a LENNY'S BLUE VELVET LOUNGE,

Plaintiffs

-vs-

NEW YORK STATE LIQUOR AUTHORITY, ERIE COUNTY ALCOHOLIC BEVERAGE CONTROL BOARD and LOUIS J. LEFKOWITZ, Attorney General, State of New York,

Defendants

Index #E-67642
FILED JUN 21, 1979
ERIE COUNTY CLERK'S OFFICE

APPENDIX C

Judgment of New York Supreme Court appealed from

A motion having been duly made by defendants at a Special Term of this court held at the Erie County Courthouse, in the City of Buffalo, New York, on the 20th day of March, 1978, for an order dismissing the complaint pursuant to CPLR 3211, and this court having treated said motion as a motion for summary judgment pursuant to CPLR 3211(c), and thereafter this court having determined that there are no triable issues of fact and that pursuant to CPLR 3212(b) plaintiffs are entitled to summary judgment as a matter of law, and an order having duly entered in the office of the Erie County Clerk on the 8th day of June, 1979, granting summary judgment and directing the entry of judgment as hereafter provided,

NOW, on the motion of JAMES L. KENNEDY, Assistant Attorney General, of counsel to ROBERT ABRAMS, Attorney General of the State of New York, it is

ADJUDGED, that that portion of Section 106, Subdivision 6-a of the Alcoholic Beverage Control Law of the State of New York (L. 1977, c. 321, §1) which provides as follows:

> "... nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola or any simulation thereof."

is hereby declared to be invalid and unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 8, of the New York State Constitution and is directed to be severed therefrom.

Dated: June 20, 1979 s/JOHN H. DOERR
ENTER: John H. Doerr, *J.S.C.*

GRANTED JUN 21 1979
COURT CLERK L. S. CHROSNIAK

APPENDIX D
MEMORANDUM DECISION OF NEW YORK SUPREME COURT

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

DENNIS BELLANCA, d/b/a THE MAIN EVENT; JAMES C. DeMARCO, d/b/a COLONIE RESTAURANT; BIAGIO DiBLASI & GENNIE PALOMBO, d/b/a FRANK'S CASA NOVA; VINCENT IUDICE, d/b/a 19th HOLE RESTAURANT; PETER KACHINOSKI, d/b/a KACH'S CORNER; JACOB P. PAGANO, d/b/a THE SILVER COACH; RON PAOLINI, d/b/a FRIDAYS AND SATURDAYS LOUNGE; STANLEY J. PROCYSHYN & SYLVIA PROCYSHYN, d/b/a SHVEEDEE'S LOUNGE; NEAL RADICE, d/b/a RADICE'S LOUNGE; SAMUEL RESMAN, d/b/a GLO MAR BAR; TALE OF THE TIGER, INC., d/b/a FLAY'S STEAK PUB; LEONARD ZAMBITO, d/b/a LENNY'S BLUE VELVET LOUNGE,

Plaintiffs

-vs-

NEW YORK STATE LIQUOR AUTHORITY, ERIE COUNTY ALCOHOLIC BEVERAGE CONTROL BOARD and LOUIS J. LEFKOWITZ, Attorney General, State of New York,

Defendants

RECEIVED APR. 3 1979
N.Y.S. DEPT. OF LAW
BUFFALO OFFICE

DOYLE & DENMAN
(George P. Doyle *of counsel*)
for Plaintiffs

APPENDIX D

Memorandum Decision of New York Supreme Court

LOUIS J. LEFKOWITZ, Attorney General
(James L. Kennedy *of counsel*)

WARREN B. PESETSKY
(Martin P. Mehler *of counsel*)
for New York State Liquor Authority and Erie County Alcoholic Beverage Control Board

MEMORANDUM

JOHN H. DOERR, J.

This is a motion by the Attorney General pursuant to CPLR 3211(a) (7) and CPLR 6314 to dismiss the complaint herein, or in the alternative a vacatur of the preliminary injunction imposed upon the defendants by this Court on July 27, 1977.

The factual background is not in dispute. The underlying action seeks a declaratory judgment that section 106 of a part of the amendment to "The Alcoholic Beverage Control Law (A.B.C. Law), Laws of 1977, C. 321, effective July 28, 1977, is null and void under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 8 of the New York State Constitution. The subsection under attack provides:

> "*No retail licensee for on-premise consumption* shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, nor *shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof.*" (A.B.C. Law, §106[6-a]).

APPENDIX D
Memorandum Decision of New York Supreme Court

That portion which the plaintiffs' contend is unconstitutional is in italics and relates to the prohibition against topless dancing.

Up to the present time topless dancing has been regulated by State Liquor Authority rule, 9 NYCRR, §53.1.

> "Any license or permit issued pursuant to the Alcoholic Beverage Control Law may be revoked, cancelled or suspended for the following causes:
>
> * * *
>
> "(s) for suffering or permitting any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof ... the provisions of this subdivision shall not apply to any female entertainer performing on a stage or platform which is at least eighteen inches above the immediate floor level and which is removed by at least six feet from the nearest patron."[1]

This Court has not been advised as to what findings or circumstances prompted the legislative enactment setting more restrictive standards than the S.L.A. rule which was in effect prior to such amendment. A memo relative to the purpose of said law states that:

> "Nudity is the kind of conduct that is a proper subject for legislative action as well as regulation by the State

---

[1] 9 NYCRR, §53.1(s) has now been amended effective August 31, 1977 to read as follows: "Any license or permit issued pursuant to the Alcoholic Beverage Control Law may be revoked, cancelled or suspended for the following causes:

> (s) For suffering or permitting any female to appear on licensed premises in such manner or attire as to expose to view any portion of the bust below the top of the areola, or any simulation thereof."

APPENDIX D

Memorandum Decision of New York Supreme Court

> Liquor Authority as a phase of liquor licensing. It has long been held that sexual acts and performances may constitute disorderly behavior within the meaning of the Alcoholic Beverage Control Law. What soberness and dress conceal, drunkenness and nudity reveal. Freedom, undisciplined by a sense of responsibility in its use, can produce chaos.
>
> "Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand." (New York State Legislative Annual — 1977, p. 150, memorandum of Assemblyman John A. Esposito.)

Each of the plaintiffs owns and operates various premises in the Western New York area licensed by the New York State Liquor Authority (S.L.A.) for the on-premises consumption of alcoholic beverages, and in each instance features topless dancing. All have complied with the prior requirements of S.L.A. Rule, 9 NYCRR, §53.1(s), *supra*, but contend that the amended statute, at least that portion under attack, will cause irreparible harm by way of decrease in business income.

The plaintiffs have sufficient standing to request a declaratory judgment of an issue ripe for determination.

In *Salem Inn, Inc.* v. *Frank*, 501 F2d 18, the United States Court of Appeals, Second Circuit (1974), as a matter of adjective law, affirmed by divided vote, the grant of a preliminary injunction by the Federal District Court which restrained enforcement of a Town of North Hempstead, New York, ordinance, which, *inter alia*, prohibited "topless dancing in any public place."

The question presented is not one of personal freedom but governmental restraint and the balancing thereof is weighted in favor of free expression.

APPENDIX D
Memorandum Decision of New York Supreme Court

In finding the requisite probability of success on the merits, the court held that, "Dancing is a form of expression protected by the first amendment. Even nude dancing in a bar can be within the constitutional protection of free expression. See *California v. LaRue*, 409 US 109, 118, 93 SCt 390, 397, 34 LED2d 343 (1972) (Rehnquist, J.)." (*Salem Inn, Inc.* v. *Frank, supra.*)

The posture of the case in the Second Circuit did not allow determination of the substantive issue relative to "topless dancing" but found the North Hempstead ordinance to be overbroad on its face, sufficiently so for petitioners to meet the test as to the possibility of success on the merits.

That determination was reviewed by the United States Supreme Court *(certiorari)* in *Doran* v. *Salem Inn Inc.*, 422 US 922, 45 LED2d 648, 95 SCt 2561.

The majority decision stated that:

> "Although the customary 'bar room' type of nude dancing may involve only the barest minimum of protected expression, we recognize in *California v. LaRue*, 409 U.S. 109, 118, 34 L.Ed. 2d 342, 93 S.Ct. 390 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In *LaRue*, however, we concluded that the broad powers of the State to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a state could therefore ban such dancing as a part of its liquor license program."

Mr. Justice Rehnquist in delivering the opinion of the Court held that:

> "Even if we assume that the State of New York has delegated its authority under the Twenty-first Amendment to towns such as North Hempstead, and that the

> ordinance therefore be constitutionally valid under *LaRue, supra,* if limited to places dispensing alcoholic beverages, the ordinance in this case is not so limited."

As a result of such judicial determinations, North Hempstead abandoned such ordinance and enacted in its place another and narrower one which excluded various types of nude appearance in a cabaret, bar or lounge, dance hall, discotheque, restaurant or coffee shop.

The United States District Court for the Eastern District of New York held such ordinance violative of the First and Fourteenth Amendments, and granted summary judgment with a permanent injunction against the enforcement thereof, wich the United States Court of Appeals, Second Circuit affirmed. (*Salem Inn Inc.* v. *Frank,* 522 F2d 1045 [1975]). That court stated that:

> "... however much topless dancing may be regarded by some to be in the teeth of good taste, it is, on the record here, a harmless form of diversion or entertainment, by way of communication from one human being to others. That interchange of communication is subject to constitutional protection so long as some legitimate interest of the State (or community) or others is not infringed upon."

In the case at bar such pronouncement tests what limitation, if any, is imposed upon the First Amendment by the Twenty-first.

California v. *LaRue, supra,* was decided by the United States Supreme Court prior to either of the *Salem Inn Inc.* v. *Frank* cases or *Doran* v. *Salem Inn (supra)* and defendants urge that it is controlling here relative to the legislative power of the State to absolutely prohibit topless dancing in all premises licensed by the S.L.A.

APPENDIX D

Memorandum Decision of New York Supreme Court

Whenever a right of constitutional dimension is being restricted or revoked based upon the authority of a judicial pronouncement, that case deserves special scrutiny.

In *LaRue, supra,* the Supreme Court majority began by writing that the California Department of Alcoholic Beverage Control:

> "Concerned with the progression in a few years' time from 'topless' dancers to 'bottomless' dancers and other forms of 'live entertainment' in bars and nightclubs that it licensed, the Commission heard a number of witnesses on this subject at public hearings held prior to the promulgation of the rules. The majority opinion of the District Court described the testimony in these words:
>
> > "Law enforcement agencies, counsel and owners of licensed premises and investigators for the Department testified. The story that unfolded was a sordid one primarily relating to sexual conduct between dancers and customers . . ." 326 F Supp 348, 352."[2]

Based upon the evidence presented and at the conclusion thereof, the challenged regulations were promulgated which prohibited various kinds of conduct on licensed premises but in no manner addressed themselves specifically to topless dancing.[3] Based upon the totality of circumstances uncovered in California, the Supreme Court took the position that the departmental rules which resulted were neither irrational nor unreasonable on their face.[4]

---

[2]For additional references to the transcript of the hearing and findings see opinion Rehnquist, J., 409 US 109, 111; 34 L Ed 2d 342, 347-348.

[3]The challenge to the rule prohibiting topless waitresses was withdrawn on oral argument with the concession that they were outside the protection of the First Amendment.

[4]*California v. LaRue, supra,* Footnote 5. 409 US 109, 119; 34 L Ed 2d 342, 352.

APPENDIX D
Memorandum Decision of New York Supreme Court

That court found that the substance of the California regulations related to "... 'performances' that partake more of gross sexuality then of communication" and concluded that:

> "This is not to say that all such conduct and performance is without the protection of the First and Fourteenth Amendments, but we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clas ballet troupe in a theater." (409 US 117, 118; 34 L Ed 342, 352.)

The United States Court of Appeals (Ninth Circuit) carefully followed the Supreme Court in affirming a District Court denial of a preliminary injunction and request for a three judge panel relative to an attack on the California Department of Alcoholic Beverage Control Administrative Rule held facilly valid in *LaRue, supra.* It should be made clear that such Rule does allow topless dancing under circumstances similar to the New York A.B.C. Rule in effect prior to the statutory enactment here under review.[5] *(Richter v. Dept. of Alcoholic Beverage Control,* 559 F 2d 1168 [1977]).

Again the court relied upon what is lacking here, namely the findings which prompted such enactment and added reasonableness to such rule.

> "In this case, it was shown at the hearings held prior to the promulgation of the rules that a vast amount of

---

[5]California Dept. of Alcoholic Beverage Control Rule 143.3 provides in relevant part:

> (2) Subject to the provisions of Subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only when a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

various crimes (e.g., rape, prostitution, public indecency, assaults, etc.) was taking place on or near premises wherein the forms of entertainment delineated in the rules occurred. The Department's regulations were a form of prophylactic action to prevent victimizing by, or victimization of, intoxicated patrons of such establishments. The Supreme Court in *LaRue* found the Department's efforts to be reasonable and this court is bound by that holding." *Richter, supra,* p 1172.

In New York the S.L.A. had approved and allowed topless dancing if in accordance with the specific rule adopted to cover same (9 NYCRR, §53.1[s], *supra*).

There has been no showing or indication whatsoever that such rule was unworkable or deficient in any respect. This Court has not been advised of any hearings, investigations or testimony of any sort such as that which prompted the California rule and its sanction in *LaRue, supra.* The legislative memo, *supra,* is of no assistance in this regard.

Whether or not topless dancing rises to the plateau of artistic endeavor in the minds of all, to some it is an art form and a type of expression protected by First Amendment expression unless the State is able to show some serious and compelling reason to limit it. Bland reliance on the Twenty-first Amendment is insufficient.

It must be remembered that the issue here is not sexuality and in fact not even nudity per se.

It is also observed that the establishments involved are licensed by the S.L.A. and subject to numerous controls and

investigative procedures with license renewal an annual ritual.[6]

Furthermore in the area of breech of law, there are sufficient penal statutes and local ordinances designed to protect the public and preserve the peace.

It stands undisputed that the premises in question are reserved to adults and clearly advertise from the exterior the type of entertainment within. Possibly then the disapproving persons are upset by the advertising and dismayed by the topless concept but such distress is insufficient to trample upon the rights of others and particularly so when such rights, as indicated, are of the barest constitutional dimension.

The motion by the defendants to dismiss the complaint and vacate the temporary injunction is denied.

Plaintiffs are entitled to a declaratory judgment declaring Alcoholic Beverage Control Law, §106 (6-a), Laws of 1977, C. 321, constitutional, except as to that portion only which prohibits dancing and such part is severed therefrom (Statutes, §150 [d]).

DATED: April 2, 1979
Buffalo, New York

s/ JOHN H. DOERR
John H. Doerr
Justice Supreme Court

---

[6]The defendants argue that:

> "It should be noted that the added subdivision would have no effect on legitimate theaters, in which the stage and seating areas are not licensed." (Def's Brief, p 2)

However, many legitimate theaters would be severely restricted relative to presentation based upon the constant threat of license revocation by the S.L.A. since such theaters rely upon the sale of alcoholic beverages for additional and badly needed revenues.

No. 80-813

FILED
MAR 2
ALEXANDER
CLE

IN THE

Supreme Court of the United States

October Term, 1980

NEW YORK STATE LIQUOR AUTHORITY,

Petitioner,

against

DENNIS BELLANCA, d/b/a THE MAIN EVENT; JAMES C. DeMARCO, d/b/a COLONIE RESTAURANT; BIAGIO DiBLASI & GENNIE PALOMBO, d/b/a FRANK'S CASA NOVA; VINCENT IUDICE, d/b/a 19th HOLD RESTAURANT; PETER KACHINOSKI, d/b/a KACH'S CORNER; JACOB P. PAGANO, d/b/a THE SILVER COACH; RON PAOLINI, d/b/a FRIDAYS AND SATURDAYS LOUNGE; STANLEY J. PROCYSHYN & SYLVIA PROCYSHYN, d/b/a SHVEEDEE'S LOUNGE; NEAL RADICE, d/b/a RADICE'S LOUNGE; SAMUEL RESMAN, d/b/a GLO MAR BAR; TALE OF THE TIGER, INC., d/b/a FLAY'S STEAK PUB; LEONARD ZAMBITO, d/b/a LENNY'S BLUE VELVET LOUNGE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

DOYLE & PHELAN
Attorneys for Respondents
GEORGE P. DOYLE
Of Counsel
10 Ellicott Square Building
Buffalo, New York 14203
Telephone (716) 856-3486

BARBARA DELGRASS
On the Brief

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

TABLE OF CONTENTS.

	Page
Statement of the Case	2
Argument	3
Decision by this Court of the First Amendment Issue in this case would not end this litigation and the record presented is inadequate	3
The New York Court of Appeals decision was not in conflict with applicable decisions of this Court	5
Conclusion. This petition for Writ of Certiorari to the New York Court of Appeals should be denied.	7

TABLE OF AUTHORITIES.

CASES:

California v. LaRue, 409 US 109	5,6
Craig v. Boren, 429 US 190	6
Doran v. Salem Inn, 422 US 922	5,6
Gospel Army v. City of Los Angeles, 321 US 543	3
Hammerstein v. Superior Court of California *et al.*, 341 US 491, Rehearing denied 342 US 843	3
Jones v. State Board of Education of Tennessee, 397 US 31, Rehearing denied 397 US 1018	5
N. E. Pope *et al.* v. Atlantic Coast Line Railroad Co., 345 US 379	4
Zacchini v. Scripps-Howard Broadcasting Co., 433 US 562	4

RULES:

Rules of the Supreme Court 17(c)	3

IN THE

Supreme Court of the United States

October Term, 1980

No._____

NEW YORK STATE LIQUOR AUTHORITY,
Petitioner,

against

DENNIS BELLANCA, d/b/a THE MAIN EVENT; JAMES C. DeMARCO, d/b/a COLONIE RESTAURANT; BIAGIO DiBLASI & GENNIE PALOMBO, d/b/a FRANK'S CASA NOVA; VINCENT IUDICE, d/b/a 19th HOLE RESTAURANT; PETER KACHINOSKI, d/b/a KACH'S CORNER; JACOB P. PAGANO, d/b/a THE SILVER COACH; RON PAOLINI, d/b/a FRIDAYS AND SATURDAYS LOUNGE; STANLEY J. PROCYSHYN & SYLVIA PROCYSHYN, d/b/a SHVEEDEE'S LOUNGE; NEAL RADICE, d/b/a RADICE'S LOUNGE; SAMUEL RESMAN, d/b/a GLO MAR BAR; TALE OF THE TIGER, INC., d/b/a FLAY'S STEAK PUB; LEONARD ZAMBITO, d/b/a LENNY'S BLUE VELVET LOUNGE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Statement of the Case

Petitioners seek a writ of certiorari to obtain Supreme Court review of a decision of the New York Court of Appeals. Following New York civil procedure, this case reached the highest New York court after only summary proceedings at the trial court level.

Plaintiffs in the action are owners and operators of nightclubs and restaurants licensed by the New York State Liquor Authority to sell liquor by the drink. They brought this declaratory judgment action to challenge, on federal and state constitutional grounds, the validity of a New York statute prohibiting exposure of female breasts in bars. On a notice to dismiss by the defendants, the State Liquor Authority, the trial court granted summary judgment for the plaintiffs, and declared the statute unconstitutional as applied to topless dancing in licensed premises. The memorandum decision by the trial judge explicitly rested on both federal and state grounds.

Direct appeal to the New York Court of Appeals was taken, bypassing the intermediate appellate court. The Court of Appeals affirmed, without discussing the State constitutional issue, finding the First amendment issue dispositive. (Petitioners' appendix, A-8, fn 5). Enforcement of the statute in question was enjoined to the extent that topless dancing is involved.

ARGUMENT

Decision by this Court of the First Amendment Issue in this case would not end this litigation and the record presented is inadequate.

Even if all requirements for jurisdiction are met, this Court has discretion to refuse to exercise that jurisdiction on petition for a writ of certiorari. Rules of the Supreme Court, 17(c), *Hammerstein v. Superior Court of California et al.*, 341 US 491, rehearing denied 342 US 843. In deciding whether a case is appropriate for its jurisdiction, the Court may look to the State Court judgment and opinion as well as other circumstances which may be present. *Gospel Army v. City of Los Angeles*, 331 US 543.

Because this Court's reversal of the New York Court of Appeals on the federal question will not end this litigation, and because of the paucity of the record in this case, this Court should exercise its discretion and deny the petition.

The New York Court of Appeals affirmed the trial court's decision on federal constitutional grounds, and declined to reach the state constitutional question. The rights of the parties have not been fully adjudicated at this point, because only the federal constitutional issue has been decided by the New York Court. This is true, even though the judgment may be technically "final". The real question is whether the record shows that the order of the appellate court has fully adjudicated the rights of the parties, and whether that adjudication is subject to further review by the state court. *Gospel Army v. City of Los Angeles, supra*, at 547.

This Court's power over state court judgments is to correct them to the extent that they incorrectly adjudge federal rights. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 US 562. It does not revise state court opinions. The purpose of the rule requiring this Court to review only "final" judgments is to prevent the unnecessary Supreme Court decisions on federal questions, which may prove to be irrelevant and unnecessary to the complete disposition of the litigation. *N. E. Pope et al. v. Atlantic Coast Line Railroad Co.*, 345 US 379.

Because the Court of Appeals did not decide the State constitutional issue, a decision by this Court to reverse on the federal ground would leave the trial court's decision intact insofar as it rests upon state law. Enforcement of the statute would still be enjoined, and further appeals would surely follow. The litigation would not end with the decision of this court, and that decision may well prove to be irrelevant to the disposition of the rights of the parties.

This case reached the Court of Appeals on an expedited appeal from an accelerated judgment. Because of this, the record provides sparse material for this Court to use as a basis for decision of an important issue of state power and First Amendment rights.

The trial court's decision was for summary judgment in favor of the plaintiff bar owners. The evidence before the court was in the form of affidavits only. No hearing was held, no testimony was taken. There was no evidence presented to justify this prohibition of topless dancing, nor any evidence of any misconduct or ill effects associated with this activity.

The only "legislative history" before this court on this record is a memorandum by a single assemblyman, the sponsor of the challenged legislation. This memorandum presents no facts, but merely asserts that "common sense dictates that nudity in bars produces undesirable behavior". No specific instances of "undesirable behavior" or reports of dangerous acts are shown anywhere in the record. Compared with the detailed legislative findings and record of "bacchanalian revelries" in the *California vs. LaRue* case, 409 US 109, the record here is inadequate indeed.

This Court has denied certiorari where the record in a case did not completely present all the relevant facts and circumstances, on the grounds that the case was an "inappropriate vehicle" for the decision of an important First Amendment issue (*Jones v. State Board of Education of Tennessee*, 397 US 31, rehearing denied, 397 US 1018). Likewise, this case reaches this Court on a record which contains inadequate facts to assess the decision of this important First Amendment question. The Court should therefore exercise its discretion to deny the petition.

The New York Court of Appeals decision was not in conflict with applicable decisions of this Court.

The New York Court of Appeals correctly applied the decisions of this Court in *California v. LaRue*, 409 US 109 and *Doran v. Salem Inn*, 422 US 922. Contrary to the contentions of petitioners, these cases do not compel the Court to uphold the Alcoholic Beverage Control Law section here in question.

Unlike the *LaRue* case, this is not a broad attack on the facial validity of a statute prohibiting sexually explicit performances. Rather, this challenge is to the States power to prohibit activity which is admitted to be neither lewd nor obscene. In fact this Court, in *Doran, supra*, recognized bare-breasted dancing as a form of expression. *LaRue* held only that the State of California had shown reason to justify prohibition of conduct, including "gross sexual performances", notwithstanding the incidental effect on constitutionally protected activities. "Topless" dancing was not in question in *LaRue*. In fact, the regulations upheld in that case did not prohibit topless dancing.

Statements from *Doran v. Salem Inn, supra*, cited by petitioner in its brief as construing *LaRue* to allow prohibition of topless dancing were considered by the New York Court of Appeals. The Court recognized these statements as *obiter dicta*, and considered contrary dicta from *Craig v. Boren*, 429 US 190, 207, and decided to rely upon those factors exhaustively discussed and relied upon by this Court in *LaRue*.

The decision of the New York Court of Appeals in this case was not in conflict with applicable decisions of this Court. Therefore, the petition for a writ of certiorari should be dismissed.

CONCLUSION

This petition for Writ of Certiorari to the New York Court of Appeals should be denied.

Dated: Buffalo, New York,
March 17, 1981.

Respectfully submitted,

DOYLE & PHELAN
Attorneys for Respondents
GEORGE P. DOYLE
Of Counsel

Barbara DelGrass
On the Brief